PP v. PHEE BOON POH & ORS

HIGH COURT MALAYA, PULAU PINANG
ABDUL WAHAB MOHAMED JC
[CRIMINAL REVISION NO: PA-43-06-08-2017]
14 AUGUST 2017

CRIMINAL PROCEDURE: *Revision – Remand proceedings – Initial objection raised regarding issue of applicants' access to legal representatives under s. 28A of Criminal Procedure Code – Parties agreed for initial objection to be decided upon before proceeding with merits of remand application – Senior Assistant Registrar ('SAR') granted remand order for period of five days – Whether decision invalid – Whether SAR's failure to determine on initial objection deprived applicants from fundamental rights to legal counsel – Whether there was failure to comply with s. 117 of Criminal Procedure Code – Whether applicants denied right to be heard on merits – Federal Constitution, art. 5(3) – Criminal Procedure Code, s. 323*

The applicants were arrested by the Malaysian Anti Corruption Commission ('MACC'). The respondent had caused the applicants to appear before the Senior Assistant Registrar ('SAR') for the purpose of obtaining a remand order under s. 117 of the Criminal Procedure Code ('CPC'). The first applicant had raised the initial objection in respect of the prohibition by the respondent for the applicants to have access to their legal representatives under s. 28A CPC ('the initial objection'). It was agreed between the parties that the said initial objection should be decided upon before the parties proceed with their submission on the merits of the respondent's remand application. Upon hearing of the initial objection, the SAR proceeded to adjourn the matter for the determination of the said initial objection. The SAR decided to allow the respondent's application and granted a remand order for a period of five days ('the decision'). The applicants submitted that the said decision was invalid and contravened the law. Thus, the applicants applied pursuant to s. 323 of the CPC seeking for this court to exercise its revisionary powers on the decision made by the subordinate courts and submitted that the applicants had been denied their right (i) to be heard with regards to the merits of the respondent's remand order application and, (ii) to be given a decision in respect of the initial objection. The applicants also claimed they had been denied their right as provided under art. 5(1) of the Federal Constitution ('FC'). The applicants further argued, *inter alia*, that the detention of five days remand as allowed by the SAR after the original detention was clearly not in compliance with the strict rule under s. 117 of the CPC and any other applicable laws. The issues that arose were (i) whether the SAR had failed to make a ruling on the initial objection and (ii) whether the applicants had been denied their right to be heard on the merits with regard to the remand order application.

Held (setting aside order of SAR):

(1) Section 28A of the CPC and art. 5(3) of the FC are joint rights of an accused person. To that extent, as a matter of judicial practice, before a court exercises its judicial discretion, there are procedural safeguards and fairness that should be followed in respect of an application of this nature. Therefore, the reasons justifying the deprivation of the applicants' liberty must be clearly stated. Failure of the SAR to determine on the said initial objection had deprived the applicants from their fundamental rights to a legal counsel thereupon causing adverse consequences to the applicants. This in itself was sufficient to allow this application. (para 25)

(2) A s. 117 remand requires the Magistrate to be satisfied that 'the accusation or information is well founded for the police to make his application for detention' and that these grounds are subject to judicial scrutiny. The SAR, in allowing the remand application without allowing the defence counsel to submit on the merit of the case, had not acted in compliance with the strict requirement of s. 117 and had at the same time denied natural justice and a fair trial thereby occasioned a serious miscarriage of justice which had seriously prejudiced the applicants. (paras 33 & 36)

(3) In the adversarial of the criminal procedure, there are fundamental safeguards built into the law to guarantee equality and fairness which ought to be strictly observed and complied with. In criminal proceedings, it would only be fair if there is equality of arms between the prosecution and the defence. In the circumstances, this was an instance that required this court's intervention considering that the requirement of basic fairness was breached. Such irregularities could not be cured under s. 422 of the CPC. (paras 37 & 38)

Case(s) referred to:

Abdul Ghani Che Mat v. Pengerusi Suruhanjaya Pasukan Polis & Ors [2017] 3 CLJ 399 CA ***(refd)***

Bird Dominic Jude v. PP [2014] 4 CLJ 133 FC ***(refd)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Dasthigeer Mohamed Ismail v. Kerajaan Malaysia & Anor [1999] 6 CLJ 317 HC ***(refd)***

Fadiah Nadwa Fikri & Ors v. Konstable Fauziah Mustafa & Ors And Another Case [2015] 10 CLJ 259 HC ***(refd)***

In Re Mohamad Ezam Mohd Nor [2002] 5 CLJ 156 HC ***(refd)***

In Re The Detention Of S Sivarasa & Ors [1997] 1 CLJ 471 HC ***(refd)***

Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Leonard Teoh Hooi Leong v. PP [2012] 10 CLJ 104 CA ***(refd)***

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***

Malaysia Airline System Bhd v. Wan Sa'adi Wan Mustafa [2015] 1 CLJ 295 FC ***(refd)***

Mohammad Shafiq Dollah lwn. Sarjan Mejar Abdul Manaf Jusoh & Yang Lain Dan Satu Kes Lagi [2013] 2 CLJ 1096 HC ***(refd)***

Mokhtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489 CA ***(refd)***
PP v. Kulasingam [1974] 1 LNS 118 HC ***(refd)***
R v. Immigration Tribunal ex parte Jeyeanthan [1999] 3 All ER 231 ***(refd)***
Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 1 LNS 129 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35
Criminal Procedure Code, ss. 28A(2), (3), (4), (5), (6), (7), (8), (9), (10), (11), 117(1), (5), 323(1), 422
Federal Constitution, arts. 5(1), (3), 8

For the 1st applicant - Ramkarpal Singh Karpal Singh; M/s Karpal Singh & Co
R Nethaji Rayer; M/s R Nethaji Rayer & Co
For the 2nd & 3rd applicants - Devkumar K Kumaraendran; M/s Kumar & Co
For the prosecution - Tengku Amir Zaki Tengku Abdul Rahman & Ahmad Ghazali Muhammad Nadzri; DPPs

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Mohamed JC:

Introduction

[1] This is an application made by the applicants pursuant to s. 323 of the Criminal Procedure Code (CPC) seeking for this court to exercise its revisionary powers on the decision made by subordinate courts under s. 323 CPC which provides as follows:

> 323. Powers to call for records of Subordinate Courts
>
> (1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that Subordinate Court.

Background Facts

[2] The applicants were arrested by the Malaysian Anti-Corruption Commission ('MACC') on 11 August 2017 at about 4pm.

[3] The respondent had caused the applicants to appear before the Senior Assistant Registrar ('SAR') in the Penang lower court for the purpose of obtaining a remand order under s. 117 of the CPC. The respondent had applied for a seven (seven) days remand order for all applicants.

[4] At the remand hearing, counsel for the first applicant had raised the initial objection in respect of the prohibition by the respondent for the applicants to have access to their legal representatives under s. 28A CPC ('the initial objection').

[5] The parties have submitted on the initial objection and it was agreed between parties that the said initial objection should be decided upon before the parties proceed with their submission on the merits of the respondent's remand application which was also agreed upon by the SAR and was put on record.

[6] Upon hearing of the initial objection, the SAR proceeded to adjourn the matter for the determination of the said initial objection. About half an hour after the said adjournment, the SAR decided to allow the respondent's application and granted a remand order for a period of five days ('the decision').

[7] The parties were shocked by the decision as it has been agreed, at all material times, by the parties including the respondent that only the initial objection will be determined before any merits of the remand application by the respondent is to be heard. The respondent's counsel had also conceded that an error had occurred in this regard.

[8] The applicants' counsel had requested that the SAR recuse herself from hearing the remand application by the respondent on the ground that the SAR is *functus officio*. The SAR proceeded to adjourn the matter to enable a new Magistrate to hear the said matter.

[9] The SAR subsequently informed the parties that the decision was final and that if the applicants' counsel were not satisfied with the said decision, they are required to file an application to a High Court Judge for the revision of the said decision.

Applicants' Submission

[10] It is the applicants' submission that the said decision was invalid and contravened the law as the merit of the respondent's application for the remand was not heard by the SAR particularly from the applicants' counsel. It was further submitted by the applicants that the said SAR had never made a ruling on the said initial objection.

[11] It is the applicants' further submission, in view of the facts and circumstances of this case, that this is a proper case for an order for revision to be made under s. 323 CPC for the following reasons:

(i) The applicants had been denied their right to be heard with regards to the merits of the respondent's remand order application;

(ii) The applicants had been denied their right to be given a decision in respect of the initial objection which, if the initial objection was allowed, the applicants would have been allowed to communicate with their lawyers for the purpose of providing instructions regarding the said remand application;

(iii) The applicants had been denied their right as provided under art. 5(1) of the Federal Constitution ('FC') which read as follows:

> No person shall be deprived of his life or personal liberty save in accordance with the law

(iv) The said remand order for the period of five days as allowed by the SAR was clearly *ultra vires* the FC;

(v) The detention of five days remand as allowed by the SAR after the original detention was clearly not in compliance with the strict rule under s. 117 CPC and any other applicable laws;

(vi) The detention of five days remand as allowed by the SAR after the original detention is null and void and deemed ineffective; and

(vii) The unlawful detention of the applicants is in contravention of the principles of natural justice and had resulted in an irreparable injustice.

Respondent's Submission

[12] The respondent in disputing this application for revision contended that the provision under s. 117(5) of the CPC is a directory as opposed to a mandatory requirement. As such, the respondent submitted that the failure of the SAR to grant the right to be heard does not make the remand order invalid as the mandatory provision required to be considered by a Magistrate in a remand order application is under s. 117(1).

[13] It is submitted by the respondent that the Magistrate in granting the remand order was supplied with the investigator's ID, the arresting officer's ID, the diary of investigation and the application for remand. The SAR having stood down the case for 20 minutes to consider the case before her and had therefore acted in compliance with s. 117(1) of the CPC.

The Law On The Revisionary Powers Of The High Court

[14] Section 323(1) of the CPC empowers a judge to call for and examine the record of any proceedings before any inferior criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed (see *Leonard Teoh Hooi Leong v. PP* [2010] 3 MLJ 373; [2012] 10 CLJ 104, CA). The object of the revisionary powers was explained in the case of *Liaw Kwai Wah & Anor v. Public Prosecutor* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69 wherein Abdul Hamid CJ (as he then was) stated the object of revision as follows:

> We would observe that the power of revision is to be exercised in accordance with the law for the time being in force relating to criminal procedure. In the present case that law is the Criminal Procedure Code. We would also observe that the object of the revisionary powers provided for in the Code is:

A … to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.

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[15] Section 31 of the Courts of Judicature Act 1964 (Act 91) provides that the High Court may exercise its powers of revision in respect of the criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure. Section 35 of the said Act confers on the High Court a general supervisory and revisionary jurisdiction over all subordinate courts. Sections 31 and 35 read as follows:

C

Revision of criminal proceedings of subordinate courts

31. The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

D

General supervisory and revisionary jurisdiction of High Court

35. (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

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(2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter of proceeding in question shall be stayed pending further order of the High Court.

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[16] In considering the court's powers of revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice (see *PP v. Kulasingam* [1974] 1 LNS 118; [1974] 2 MLJ 26). It was decided by the Supreme Court in the case of *Liaw Kwai Wah and Anor v. Public Prosecutor* that the power of revision is discretionary and it must therefore be exercised judicially and within the limits and spirit of the legislation for the purpose of correcting miscarriage of justice.

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Court's Finding

[17] Bearing the above authorities and its principles in mind, I turn now to the facts of the present case before me. Having scrutinised the record of proceedings, the grounds for the decision and other documents which the SAR purported to rely on in allowing the remand application by the respondent and having heard submissions by both parties, it is evident that there were two main issues to be determined by the said SAR as follows:

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(i) The initial objection as raised by the applicants' counsel for the invocation of s. 28A(8) of the CPC by the respondent in denying the applicants' access to communicate with their relative, friends and/or legal representatives; and

(ii) The application for remand order by the respondent under s. 117 of the CPC.

[18] To appreciate the issues which arise for decision, it would be practical to take a closer look into the relevant provisions insofar as they are relevant to the present application:

The relevant part of art. 5 of the FC provides:

> (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
>
> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

The relevant part of art. 8 of the FC provides:

> (1) All persons are equal before the law and entitled to the equal protection of the law.

Section 28A of the CPC provides for the rights of person arrested as follows:

> (1) A person arrested without a warrant shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.
>
> (2) A police officer shall, before commencing any form of questioning or recording of any statement from the person arrested, inform the person that he may:
>
> (a) Communicate or attempt to communicate, with a relative or friend to inform of his whereabouts; and
>
> (b) Communicate or attempt to communicate and consult with a legal practitioner of his choice.
>
> (3) Where the person arrested wishes to communicate or attempt to communicate with the persons referred to in paragraphs (2)(a) and (b), the police officer shall, as soon as may be, allow the arrested person to do so.
>
> (4) Where the person arrested has requested for a legal practitioner to be consulted, the police officer shall allow a reasonable time:

A (a) for the legal practitioner to be present to meet the person arrested at his place of detention; and

(b) for the consultation to take place.

(5) The consultation under subsection (4) shall be within the sight of a police officer and in circumstances, in so far as practicable, where
B their communication will not be overheard.

(6) The police officer shall defer any questioning or recording of any statement from the person arrested for a reasonable time until the communication or attempted communication under paragraph 2(b) or the consultation under subsection (4) has been made.

C (7) The police officer shall provide reasonable facilities for the communication and consultation under this section and all such facilities provided shall be free of charge.

(8) The requirements under subsections (2), (3), (4), (5), (6) and (7) shall not apply where the police officer reasonably believes that:
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(a) compliance with any of requirements is likely to result in:

(i) an accomplice of the person arrested taking steps to avoid apprehension; or

(ii) the concealment, fabrication or destruction of evidence or
E the intimidation of a witness; or

(b) having regard to the safety of other persons the questioning or recording of any statement is so urgent that it should not be delayed.

(9) Subsection (8) shall only apply upon authorisation by a police
F officer not below the rank of Deputy Superintendent of Police.

(10) The police officer giving the authorisation under subsection (9) shall regard the grounds of belief of the police officer that the conditions specified under subsection (8) will arise and such record shall be made as soon as practicable.

G (11) The investigating officer shall comply with the requirements under subsections (2), (3), (4), (5), (6) and (7) as soon as possible after the conditions specified under subsection (8) have ceased to apply where the person arrested is still under detention under this section or under section 117.

H The relevant provisions under s. 117 of the CPC are as follows:

(5) The magistrate in deciding the period of detention of the accused shall allow representations to be made either by the accused himself or through a counsel of his choice.

(7) A Magistrate authorising under this section detention in the
I custody of the police shall record his reasons for so doing.

[19] Continuing with the sequence of events, the SAR, having heard both parties' submission in respect of the initial objection, had proceeded to allow the respondent's application and granted a remand order for a period of five days. It is against this decision by the SAR that the applicants had made this application for revision on the grounds as mentioned above.

[20] Learned counsel's arguments before me were two-fold. First, the applicants' counsel contended that the SAR, in coming to her decision, had failed to make a ruling on the initial objection; and secondly, that the applicants had been denied their right to be heard on the merits with regard to the remand order application, it is therefore the applicants' contention that the decision reached by the SAR was invalid and was in contravention of the law.

[21] I will now look in turn at the two issues raised by the applicants' counsel. With regards to the first issue, art. 5(1) of the FC stipulates that no person shall be deprived of his life or personal liberty save in accordance with law. The right of access to a legal counsel is among the fundamental guarantees of a fair trial in matters concerning deprivation of liberty which give an accused person ample opportunity to challenge the legality of his or her detention. The principle of equality of arms will be worthless if this right is not observed.

[22] Notwithstanding what has been said, it is well-settled in the case of *Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 LNS 129; [1976] 2 MLJ 245 that this right to personal liberty is however not an absolute one and is subject to qualifications (see the case of *Bird Dominic Jude v. PP* [2014] 4 CLJ 133). *In Re Mohamad Ezam Mohd Nor* [2002] 5 CLJ 156; [2001] 3 MLJ 372, it was held that the phrase "save in accordance with law" in art. 5(1) requires that there must be specific and explicit law that actually provides for it. Section 28A(8) of the CPC is a specific and explicit law that authorises the deprivation of the personal liberty in respect of the right of an accused person to consult a legal counsel.

[23] Section 28A(8) clearly provides that the requirements (2), (3), (4), (5), (6) and (7) may be suspended. However, this proviso is to be read with s. 28A(9), (10) and (11) which is enacted for the purpose of ensuring that s. 28A(8) is not wrongly invoked and/or abused. The key words in s. 28A(8) is "reasonably believes" (see *Fadiah Nadwa Fikri & Ors v. Konstable Fauziah Mustafa & Ors and Another Case* [2015] 10 CLJ 259; [2014] 1 LNS 1467). This requirement of reasonable belief imports an objective test which is to be determined by the court based on circumstances of the facts.

[24] As may be observed in the notes of proceedings, it is evident that the SAR had failed to make any ruling with regard to the initial objection raised by the applicants' counsel which was also conceded by the respondent as follows:

A	Mahkamah:	Setelah mempertimbangkan hujahan-hujahan yang diberikan oleh kedua-dua belah pihak, mahkamah memerintahkan reman selama 5 hari terhadap ketiga-tiga suspek iaitu dari 12.8.2017 sehingga 16.8.2017
B	Ramkarpal Singh:	The Court haven't made a ruling on the preliminary issue raised by us under section 28A of CPC, where all we want is for the court to decide on this issue first.DPP can you confirm this?
C	Tuan Ghazali:	Benar. Mahkamah belum lagi memutuskan ruling mengenai isu tentang peguambela-peguambela ingin mendapatkan arahan selanjutnya daripada anakguam mereka.

[25] It is pertinent to note here that in invoking s. 28A(8), the arrested person is being deprived of his right to a legal counsel as provided under art. 5(3) of the FC and s. 28A(2) to (7) of the CPC. As held in the case of *Mohammad Shafiq Dollah lwn. Sarjan Mejar Abdul Manaf Jusoh & Yang Lain Dan Satu Kes Lagi* [2013] 2 CLJ 1096, both s. 28A of the CPC and art. 5(3) of the FC are joint rights of an accused person. To that extent, as a matter of judicial practice, before a court exercises its judicial discretion, there are procedural safeguards and fairness that should be followed in respect of an application of this nature. It is therefore in my considered view that the reasons justifying the deprivation of the applicants' liberty must be clearly stated. Failure of the SAR to determine on the said initial objection had deprived the applicants from their fundamental rights to a legal counsel thereupon caused adverse consequence to the applicants. This in itself is sufficient to allow this application.

[26] For the purpose of completeness, I would now direct my attention to the second issue raised by the applicants' counsel with regards to the respondent's remand order application under s. 117 of the CPC. This is an important and crucial point into which I must carefully consider. The main thrust of the learned counsel's contention is that the applicants had been denied their right to be heard with regards to the merits of the respondent's remand order application, thus it was argued by learned counsel that the said remand order for the period of five days as allowed by the SAR was null and void and deemed ineffective on the ground that it was made not in compliance with the strict rule under s. 117 CPC and any other applicable laws and was *ultra vires* the FC.

[27] In support of his contention, learned counsel has drawn this court's attention to the Federal Court case of *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301. The principles laid down in this case is well settled and cannot be disputed, it is therefore unnecessary for me to discuss in detail the case of *Lee Kwan Woh* except to reiterate the words of Gopal Sri Ram FCJ as follows:

> … the rules of natural justice, which is the procedural aspect of the rule of law, is an integral part of Articles 5(1) and 8(1). In short, procedural fairness is incorporated in these two Articles.
>
> [18] Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by Article 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with State action that is fair both in point of procedure and substance. Whether an impugned State action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal. Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case. While upon the subject under discussion we would refer with approval to the judgment of Edgar Joseph Jr J (as he then was) in *Public Prosecutor v. Choo Chuan Wang* [1992] 2 CLJ 1242, where he held that:
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> > Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia, CJ in *Madheshwardhari Singh v. The State (ibid)* (*Madheshwardhari Singh and Anor. v. State of Bihar* [1986] AIR (Pat) 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

[28] Section 117(5) of the CPC expressly provides that a Magistrate in hearing a remand application shall allow representations to be made either by the accused himself or through a counsel of his choice. It was however the respondent's contention that s. 117(5) of the CPC are merely directive and not mandatory.

[29] The correct approach to determine whether a particular procedural provision is mandatory is not the fact that it employs words that *prima facie* carry a tenor of compulsion; for example, the word "shall". The correct test is that stated by Lord Woolf MR in *R v. Immigration Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231 which was applied in the case of *Mokhtar Amin v. Mohamed Moktar Omar* [2001] 4 CLJ 489 and *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532. I quote from the judgment of the then Master of the Rolls:

> An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see *Wade and Forsyth Administrative Law* (7th edn 1994) p 255; *Supperstone and Goudie Judicial Review* (2nd edn 1997) Ch 4 and *de Smith, Woolf and Jowell Judicial Review of Administrative Action* (5th edn 1995) pp 265-271). Frequently the investigation involves doing no more than deciding the sense in which the

A word 'shall' has been used as part of a particular procedural requirement. As the word 'shall' is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance. Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory
B and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement.

In a later passage, the Master of the Rolls went on to state as follows:

C .... I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been
D substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question). Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not
E capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended
F consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver. (emphasis added)

G **[30]** Bearing in mind the above principles, it is necessary for me to emphasise here that the requirement to observe natural justice or procedural fairness is an integral part and cornerstone of our judicial proceedings. The *audi alteram partem* rule, with its literal meaning 'hear the other side' which implies that no one should be punished without being heard, is of central importance in court proceedings. In the administration of justice, the rule
H requiring fair hearing before a decision is the *sine qua non* in any courts proceedings. Of great importance is the often quoted Federal Court case of *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152, where Raja Azlan Shah (as His Majesty then was) stated as follows:

I In my opinion, **the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action,** no matter whether it is labelled "judicial", "*quasi*-judicial", or "administrative" or whether or not the

> enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that "judicial methods may ... be entirely unsuitable, and produce delays, expenses, and public and private injury" is too well-known to be side-stepped: see *Local Government Board v. Arlidge* [1915] AC 120 138. In the last analysis, it depends on the subject-matter. The great need is to deal efficiently and fairly, rather than to preserve all the accoutrements of the courtroom; the considerations of basic fairness are paramount. (emphasis added)

[31] The *audi alteram partem* (hear the other side) rule states that a decision cannot stand unless the person directly affected by it was given a fair opportunity both to state his case and to know and answer the other side's case. Any decision reached in contravention of this rule will be void for being *ultra vires* (see the case of *Abdul Ghani Che Mat v. Pengerusi Suruhanjaya Pasukan Polis & Ors* [2017] 3 CLJ 399; [2017] 2 ILR 209; [2016] 1 LNS 1465).

[32] In the Federal Court case of *Malaysia Airline System Bhd v. Wan Sa'adi Wan Mustafa* [2015] 1 CLJ 295, Richard Malanjum CJ (Sabah & Sarawak) further held as follows particularly on procedural impropriety:

> [24] Now, procedural impropriety is said to have occurred when a decision maker (including an administrative tribunal or an arbiter) empowered by public law in the form of legislation or common law (that is, prerogative power), in coming to a decision (including his refusal to make a decision) with consequences affecting "some person or (body of persons)", fails:
>
> (i) To observe the "basic rules of natural justice";
>
> (ii) "To act with procedural fairness towards the person who will be affected by the decision"; or
>
> (iii) "To observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice". (See: *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] 1 AC 374).
>
> [25] The basic rules of natural justice are generally understood to mean the right to be heard, the rule against bias and the duty to act fairly. However, the scope of the "duty to act fairly" should be considered on a case to case basis depending on the facts and circumstances governing the relationship of those involved prior to the decision being made.
>
> [26] As regards procedural fairness it encompasses the procedures used by a decision maker and not so much the actual decision itself. Ordinarily, procedural fairness requires a hearing that is appropriate to the facts and circumstances of the matter, the absence of bias, the availability of evidence and an inquiry into the issue before a decision is made.

[33] It must be noted that a s. 117 remand requires the Magistrate to be satisfied that 'the accusation or information is well-founded for the police to make his application for detention' and that thesegrounds are subject to judicial scrutiny. Admittedly, the provision under s. 117 does not lay down standard to guide the exercise of discretionary powers, nevertheless there are several case laws which have laid down principles and considerations subject to which the power is to be exercised (see the case of *In Re the Detention of S Sivarasa & Ors* [1997] 1 CLJ 471). To sustain the rule of law, the statutory safeguards must be followed strictly.

[34] In the case of *Dasthigeer Mohamed Ismail v. Kerajaan Malaysia & Anor* [1999] 6 CLJ 317; [1999] MLJU 121, Abdul Wahab Patail J (as he then was) has taken the view that the proper way to avoid abuse is by the courts applying s. 117 strictly and exercising its discretion to remand under s. 117 not solely by the demands of convenience of the investigative and prosecution authorities, but rather by balancing such needs against the fact that any remand order is a restriction of a fundamental liberty against a person who has not been convicted of an offence.

[35] Returning to the facts of the present case before me, having perused the grounds for the decision, the SAR stated that she had acted in accordance with s. 117(5) of the CPC in allowing the defence counsel for the suspects to be present during remand proceeding. However, as evident from the record of the proceedings, the applicants' counsel were not given the opportunity to submit on the merits of the remand application. In other words, the applicants in this case were deprived of their right to be heard. This particular fact was undisputed by the respondent before me as follows:

Mahkamah:	Are you disputing the facts what transpired in the lower court? Adakah pihak responden mempertikaikan fakta yang berlaku di hadapan SAR tempoh hari
SPRM:	Apa yang berlaku kami akui bahawa tidak ada hak untuk didengar dan diberikan. Saya akui. Apa yang dinyatakan tadi benar.
Mahkamah:	Can consider kata dalam kes ini Majistret tidak beri peluang untuk peguam/orang yang kena reman bercakap?
SPRM:	Benar, saya setuju. Saya conceded. Memang begitu yang sebenarnya berlaku. Saya tidak nafikan. Seperti apa yang diterang dan dinyatakan oleh peguam pemohon adalah sebenar-benarnya berlaku. Tetapi …
Mahkamah:	Majistret atau Registrar tidak memberi peluang untuk peguam pemohon atau pemohon berhujah atau bercakap sebelum perintah reman dibuat.
SPRM:	Benar. Walau bagaimanapun, perintah diberi itu bukan satu perintah yang defective, kegagalan memberi peluang kepada pemohon-pemohon atau peguam beliau untuk

bercakap semasa proceeding reman tersebut tidak menjejaskan perintah tahanan selama 5 hari yang telah diberi. It does not affect the validity of remand order atas alasan bahawa peruntukan di bawah seksyen 117(5) ini cuma directory. Kes yang dirujuk oleh rakan bijaksana saya, re-detention of Sivarasa, semuanya berkenaan 117(1), tidak langsung menyebut tentang subsection 5, tidak boleh digunakan sebagai alasan. Dan kes yang dirujuk oleh rakan bijaksana saya right to be heard itu adalah apabila seseorang itu ditahan dan dituduh. Having charged.

[36] Guided by the above authorities and principles and having carefully considered the facts, documents and submissions by both parties, it is in my considered view that the SAR in allowing the remand application without allowing the defence counsel to submit on the merits of the case had not acted in compliance with the strict requirement of s. 117 and had at the same time denied natural justice and a fair trial thereby occasioned a serious miscarriage of justice which had seriously prejudiced the applicants.

[37] It must be stressed that in the adversarial of the criminal procedure, there are fundamental safeguards built into the law to guarantee equality and fairness which ought to be strictly observed and complied with. In criminal proceeding, it will only be fair if there is equality of arms between the prosecution and the defence.

[38] In the circumstances, this in my view is an instance that requires this court's intervention considering that the requirement of basic fairness as alluded to by Raja Azlan Shah FCJ (as His Majesty then was) in the case of *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152 was breached. Such irregularities cannot in my view be cured under s. 422 of the CPC.

[39] For the reasons adumbrated above, I therefore set aside the order made by the SAR.